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BEFORE

THE COPYRIGHT ROYALTY JUDGES

LIBRARY OF CONGRESS

WASHINGTON, DC

In re Distribution of 2010-2013 Cable Royalty Funds	Docket No. 14-CRB-0010-CD (2010-2013)

RESPONSE OF CANADIAN CLAIMANTS GROUP TO

PROGRAM SUPPLIERS' MOTION FOR REHEARING

The Copyright Royalty Judges ("Judges") issued an Initial Determination of Cable Royalty Allocation (2010-13) on October 18 ("Initial Determination"). On November 2, 2018, Program Suppliers filed a Motion for Rehearing. On November 9, 2018, the Judges entered, *sua sponte*, an Order Permitting Written Responses to the Motion for Rehearing. The Canadian Claimants Group ("CCG") hereby files its response and opposes each of the seven enumerated points in Program Suppliers' Motion for a Rehearing.

I. Introduction

Under the Copyright Act, the Judges may order rehearing only in "exceptional cases." 17 U.S.C. § 803(c)(2)(A). In the *Order Denying Motion for Rehearing* at 1 (Docket No. 2006-1 CRB DSTRA at 1 (Jan. 8, 2008), the Judges expressly adopted the standards for reconsideration of an order by federal district courts under Fed. R. Civ. P. 59(e) detailed in *Regency Comm., Inc. v. Cleartel Comm., Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)). Under that standard, a rehearing is proper only if (1) there has been an intervening change in controlling law; (2) new evidence is

available; or (3) there is a need to correct a clear error or prevent manifest injustice. *Id.*

The Judges have consistently emphasized that motions for rehearing are subject to a "strict standard." *See, e.g., Order Denying in Part SoundExchange's Motion for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions*, Docket No. 14-CRB-0001-WR (2016-2020), at 2 (Feb 10, 2016). Program Suppliers' do not satisfy this strict standard and instread do little more than reassert the arguments and evidence they offered during the hearing. The Judges have previously rejected such approaches to rehearing:

> Program Suppliers and CCG have not made a sufficient showing of clear error or manifest injustice that would warrant a rehearing. To the contrary, their arguments in support of a rehearing or reconsideration are based on the same view of the evidence that caused their similar arguments to be rejected by the Judges in their Distribution Order. In the absence of an adequate showing of new evidence, the parties' arguments in their respective motions, amount to nothing more than a recapitulation of arguments that the Judges fully considered in fashioning their Distribution Order. As such, the motions do not present the type of exceptional case that would warrant a rehearing or reconsideration.

Order Denying Motions for Rehearing, In re Distribution of the 2004-2005 Cable Royalty Funds Docket, No. 2007-3 CRB CD 2004-2005 (Jul. 19, 2010). Program Suppliers' motion also fails to present an exceptional case.

II. Discussion

The CCG address each of Program Suppliers' seven arguments for a rehearing.

1. Program Supplier Argument: It was contrary to precedent and legal error for the Judges to adopt the Crawford fees-based regression analysis as a starting point for royalty allocations. Prior decisions and the record in this proceeding support limited use of the fees-based regression analysis as corroborative evidence and not as a primary allocation methodology.

Program Suppliers argue the Judges failed to describe the "changed circumstances" or point to "other record evidence" that required using Prof. Crawford's regression analysis as the primary basis for allocating royalty shares in this proceeding and committed legal error because

"it is essentially a combination of two metrics: tonnage and royalty fees paid under the Section 111 statutory." This argument fails. In a discussion starting at page 10 of the *Initial Determination* the Judges expressly discussed prior opinions and acknowledged the "changed circumstances" analysis and then spent nearly 50 pages examining the "more granular critiques of those regressions leveled by various witnesses, to determine the weight to be accorded to each such regression." *Initial Determination* at 10–12, 13-61. Certainly, there was an adequate discussion of "changed circumstances" that lead the Judges to conclude that the regression analysis was stronger evidence than the constant sum surveys:

> "Considering all of the evidence presented in this proceeding, the Judges conclude that the constant sum survey methodology, with adjustments, provides relevant information relating to the relative value for each of the six categories remaining at issue. Considering the more persuasive regression analyses, however, the Judges afford less evidentiary power to the values derived from these adjusted survey results. The Judges conclude that Dr. Crawford's first (duplicate minutes) regression analysis is a stronger base on which to make the category allocation determination." *Initial Determination* at 79-80.

With regard to the "tonnage" claim, the Judges specifically addressed Program Suppliers' criticism that the regressions are a combination of tonnages and royalty fees:

> The Judges recognize that the two elements multiplied in such a regression – the volume of total minutes per program category and the value-per-minute are both functions of volume. The former, volume of minutes per program category, is facially a volume metric. Professor Crawford recognized that if a regression measured only volume, then it would be properly subject to criticism. Crawford WRT ¶ 74. But the latter factor in the product, the value-per-minute, is not subject to the same criticism. The value-per-minute factor is a metric for relative value, estimating the CSOs' relative demand for different categories of programming. To criticize the product as related to volume, therefore, misses the mark, because it is relative value that the Judges must determine in this proceeding" *Initial Determination* at 19.

Indeed, if regression results were simply tonnage, Program Suppliers would have been the beneficiary of that approach because of the tremendous volume of programming in their

claimant group. But regression analysis is more incisive than that and reveals the relative value of each minute of programming and showed Program Supplier content to have a relatively low value-per-minute which was reflected in the overall results.

2. Program Supplier Argument: It was legal error to rely on the Crawford regression analysis as a basis for royalty allocations because none of the expert economists who testified in this proceeding were able to independently replicate the Crawford results.

Program Suppliers claim that because Drs. Gray and Erdem testified that they could not replicate Prof. Crawford's analysis the lack of independent replication weighs against the reliability of Prof. Crawford's methodology and his methodology should not have been considered at all, let alone as a starting point for royalty allocations.

Program Suppliers complaint is fundamentally flawed because not only were all of the other economic experts able to prepare substantive responses to the Crawford Regression Study, but Drs. Erdem and Gray were able to produce a large number of criticisms of the study including variations on Professor Crawford' model, which the Judges addressed in exhausting detail over 20 pages of the Initial Determination. *Initial Determination* at 16-36. Further, both Drs. George and Israel sponsored and testified in support of the Waldfogel-type regressions, like the Crawford Study, supporting the underlying methodology. *See, e.g*., *Initial Determination* at 10, 36 n.73

As for Drs. Erdem's and Gray's inability to replicate the study, the Judges noted deficiencies in the efforts which were not attributable to Prof. Crawford. With respect to Dr. Erdem, the Judges noted that "Dr. Erdem testified he did not review and test Professor Crawford's algorithm fully because it would have taken him a week to do so. *Id*. at 14." *Initial Determination* at 16. Similarly, with respect to Dr. Gray, the Judges found that… "not only was Dr. Gray unable to replicate Professor Crawford's work, Professor Crawford also challenged Dr. Gray's assertion that he otherwise faithfully reran Professor Crawford's regression. 2/28/18 Tr.

1422 (Crawford) (asserting that Dr. Gray changed a "key element of my regression analysis… the subscriber group variation [by] aggregate[ing] that subscriber group level information up to the level of the systems, which means … he cannot do fixed effects anymore… and he then adds additional variables.")." *Initial Decision* at 34, n 69.

3. Program Supplier Argument: It was legal error to fail to articulate a reasoned basis for the defined ranges of reasonableness set for each party's royalty award and for the determination of each party's shares within those ranges, and to fail to connect those shares to the evidentiary record in this proceeding.

Program Suppliers argue the Judges first concluded that the Horowitz Survey and Crawford analysis, when adjusted to account for their respective methodological limitations, "are the best available measures of relative value" but failed to explain how they employed additional methodologies (including the Bortz Survey, the augmented Bortz results presented by Ms. McLaughlin, and the regression analysis presented by Dr. George) define the ranges of awards. They complain the Judges failed to explain precisely how they calculated each party's shares within the ranges, noting only that they used Crawford's analysis as a "starting point" and made "modest upward adjustments" for the Settling Devotional Claimant ("SDC") and CCG categories. Program Suppliers claim, therefore, that the Judges (1) failed to consider all record evidence, and (2) improperly treated similarly situated claimants differently, without explanation.

None of these grounds establish "a need to correct a clear error or prevent manifest injustice." What is important is that in rendering their opinion the Judges addressed each of the studies and the testimony of the witnesses who supported or opposed those studies. In the end, the Judges selected several studies to set the upper and lower ranges of value for the awards. While the parties may not agree with the weight accorded to some of the evidence by the Judges, or their how they treated or viewed particular pieces of evidence, the Judges' 119-page opinion is an exhaustive examination of the evidence presented by the parties.

Further, in discussing the awards, the Judges acknowledged that they took into consideration other evidence for some of the awards. For JSC, the Judges noted that Dr. Israel's cable expenditures report showed that sports programming is very costly relative to other programming. As explained, for SDC they made an upward adjustment "based on the Horowitz survey results and the Augmented Bortz survey results, together with testimony concerning the "niche" value of devotional programming. Similarly, the Judges made a modest upward adjustment to the CCG category based on Professor George's analysis and testimony that Professor Crawford's analysis (as well as the survey evidence) undervalues Canadian programming. *Initial Determination* at 118. While the Program Suppliers may not agree with those assessments and complain that the Judges did not quantify the adjustments, the results remain within the ranges applied to all parties, and so the adjustments clearly fall within the Zone of Reasonableness applicable in these proceedings. *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1304 (D.C. Cir. 1983).

4. Program Supplier Argument: It was legal error to apply an upward adjustment to the royalty awards for certain claimants as a means of bridging the disparity between the Crawford regression point estimates and other record evidence, but not do so for all affected claimants. In making such adjustments, the Judges ignored contradictory record evidence and improperly treated similarly situated claimants differently.

This argument is essentially a restatement of the third argument and CCG incorporates by reference its response to the third argument made by Program Suppliers.

5. Program Supplier Argument: It was legal error to ignore evidence of Program Suppliers' overwhelming majority share of the Horowitz Survey's Other Sports category and to reallocate Other Sports category shares to non-entitled program categories.

Program Suppliers claim the Judges' decision to reallocate the Horowitz Survey shares attributable to the Other Sports category shares among all program categories was legal error. They claim the record evidence was clear that only Program Suppliers and Commercial

Television Claimants ("CTV") could have had programming attributable to the Other Sports category.

This is not legal error. The Judge's had ample evidence that allocating all of the Other Sports category to Program Suppliers would improperly inflate Program Supplier's share, see e.g., *Initial Determination* at 64 n.113, 66, n.117, 71, 73-74, but had insufficient evidence to support such an allocation. *Initial Determination* at 74.

The Judges' fully explained their rationale for not allocating Other Sports to Program Suppliers and instead make an allocation that did not include that value.

> Horowitz's inclusion of Other Sports created a value where none, or next to none, existed and allocated all Other Sports value to Program Suppliers."
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> . . . . . .
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> However, the Judges cannot accept allocation of 100% of the Other Sports relative value to Program Suppliers. For that reason, the Judges conclude that the most appropriate treatment of the Other Sports "points" is to reallocate them in proportion to the relative values established outside the Other Sports category. The Judges' calculations are illustrated in Table 15." *Initial Determination* at 79.

6. Program Supplier Argument: It was legal error and a manifest injustice to exclude Program Suppliers' corrected testimony regarding WGNA viewing data and the related analysis but permit other parties to submit corrected testimonies.

Program Suppliers claim that while other parties where allowed to file corrections to their testimony and studies, the Judges refused to allow Program Suppliers to do the same for Dr. Gray with their *Third Errata to Amended and Corrected Written Direct Statement and Second Errata to Written Rebuttal Statement Regarding Allocation Methodologies* (Jan. 22, 2018) ("Third Errata").

But the Third Errata was not merely a correction. The Judges accepted SDC's arguments that the Third Errata included an all new Nielsen dataset, and that it offered "an all-new regression . . . , and a new sample weighting methodology . . ." *Initial Determination* at 85. Of course, the Third Errata was not singled out for such treatment. The Judges similarly denied a

request to supplement the testimony of Dr. Erdem because "the proposed supplement to Dr. Erdem's WRT goes beyond a mere effort to update calculations for accuracy or to prevent presentation of stale information." See *Order Denying SDC Motion for Leave to Supplement Written Rebuttal Testimony of Dr. Erdem*, Docket No. NO. 14-CRB-0010-CD (2010-13) (February 8, 2018).[1]

Moreover, exclusion of the Third Errata caused no harm to Program Suppliers because the Judges gave no weight to viewership—not because of the study's data problems—but because viewing does not measure relative value:

> While viewership is important for broadcasters, the Judges conclude, based on the evidence and arguments presented, that viewership, without more, is an inadequate measure of relative value of different categories of programming distantly retransmitted by cable systems. The Judges, consistent with the past several allocation decisions, give no weight to viewership evidence in allocating royalties among the various program categories. *Initial Determination* at 117.

Excluding the Third Errata was neither legal error nor manifest injustice.

7. Program Supplier Argument: It was legal error for the Judges to fail to consider or address Program Suppliers' changed circumstances evidence regarding sports migration, which was presented in the written testimony of John Mansell (Exhibit 6002), while changed circumstances evidence presented by other claimant groups was considered.

Program Suppliers waived the oral testimony of John Mansell, understanding the effect that might have on the weight of his testimony. Nevertheless, the gist of his testimony, that the amount of sports programming on distant signals had declined due to migration was addressed in the oral testimony of Sue Ann Hamilton. 3/19/18 Tr. at 4314-16 (Hamilton). Ms. Hamilton's comments about sports migration were specifically addressed by the Judges in their

[1] Indeed, the Judges are consistent in making such rulings when parties attempt to offer new studies in the guise of corrections. See, e.g., *Order Granting MPAA and SDC Motions to Strike IPG Amended Written Direct Statement and Denying SDC Motion for Entry of Distribution Order*, Docket Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase 2), at 5 (Oct. 7, 2016) (striking Amended Written Direct Statement that was filed without leave and that introduced a substantially modified regression specification).

determination. *Initial Determination* at 72. Thus, it is incorrect for Program Suppliers to claim that sports migration was not addressed.

III. Conclusion

Program Suppliers' have failed to establish that this is an exceptional case and none of their seven grounds establish "clear error" or "manifest injustice." Rather, Program Suppliers simply re-argue the positions they took in the hearing and in findings of fact and conclusions of law. Rehearings are not a vehicle for disappointed litigants to get a redo. The motion for rehearing should be denied.

Respectfully Submitted,

Dated: November 19, 2018

/s/ L. Kendall Satterfield
L. Kendall Satterfield
DC Bar No. 393953
Satterfield PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
Tel: 202-355-6432
lksatterfield@satterfield-pllc.com
Counsel for Canadian Claimants Group

Of Counsel,
Victor J. Cosentino
CA Bar No. 163672
LARSON & GASTON, LLP
200 S. Los Robles Ave, Suite 530
Pasadena, CA 91101
Telephone: 626-795-6001
Fax: 626-795-0016
victor.cosentino@larsongaston.com

Proof of Delivery

I hereby certify that on Wednesday, November 21, 2018 I provided a true and correct copy of the Response of Canadian Claimant's Group to PS Motion for Rehearing to the following:

Devotional Claimants, represented by Michael A Warley served via Electronic Service at michael.warley@pillsburylaw.com

Public Television Claimants (PTC), represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Commercial Television Claimants (CTC), represented by John Stewart served via Electronic Service at jstewart@crowell.com

Joint Sports Claimants, represented by Michael E Kientzle served via Electronic Service at michael.kientzle@apks.com

MPAA-represented Program Suppliers, represented by Lucy H Plovnick served via Electronic Service at lhp@msk.com

Signed: /s/ Victor J Cosentino